

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of	:	
Paul Armbruster	:	
Petition for Declaratory Ruling	:	CG Docket No. 02-278
	:	
Rules and Regulations Implementing the	:	DA No. 19-671
Telephone Consumer Protection Act of 1991	:	

**COMMENTS OF JUSTIN T. HOLCOMBE
IN SUPPORT OF THE PETITION OF PAUL ARMBRUSTER**

I. Introduction.

I am an attorney who represents consumers to protect their right to be left alone under the Telephone Consumer Protection Act. However, I am also a consumer and a subscriber of cellular telephone services. I am burdened with unsolicited, automated telemarketing text calls from my cellular carrier that I do not want to receive. These calls are annoying, a nuisance, and invasion of privacy. They interrupt me when busy with other activities, and they are the type of calls the TCPA was designed to prevent. Accordingly, I am submitting these comments in my individual capacity. I comment in support of the Request of Paul Armbruster. In the alternative, the petition should be granted with respect to section 64.1200(a)(2) of the Commission’s Rules, which applies only to such calls that include or introduce an advertisement or constitutes telemarketing.¹

The Commissions’ company specific do not call rule already requires that telecommunications carriers honor do not call requests with respect to telemarketing calls.² The carrier exemption is a content based exemption that favors a particular speaker, so it is

¹ 47 C.F.R. § 64.1200(a)(2).

² 47 C.F.R. § 64.1200(d); *Rules and Regulations Implementing the Telephone Consumer Protection Act*, 18 FCC Rcd. 14014, ¶¶ 100-107 (FCC 2003) (“*2003 TCPA Order*”) (finding that CPNI consent does not trump a carrier specific do not call request and that carriers are required to honor such requests).

presumptively unconstitutional and only permissible if it satisfies strict scrutiny.³ There may be compelling governmental reasons to presume consent (or exempt carriers from obtaining consent in the first instance). However, such purposes eviscerate when a subscriber makes a do not call request. Finally, recognizing the right to revoke consent is consistent with the Stopping Bad Robocalls Act, H.R. 3375, which recently passed the House of Representatives by a 429-3 vote.

II. Interest in These Proceedings.

I am filing these comments in my personal capacity. I am a subscriber of cellular telephone services from T-Mobile, which sends automated telemarketing text calls that I do not wish to receive. I reply “stop” to such messages, but they continue. This is frustrating, and it’s an invasion of privacy. Attached to the end of these comments are screenshots of some of the calls along with “stop” responses. These calls persist despite the Commission’s clear requirements that do not call requests be honored.⁴

III. Interpreting the Carrier Exemption to Post-Revocation Telemarketing Calls is Inconsistent with the History of the Rule and the Purposes of the TCPA.

“Voluminous consumer complaints about abuses of telephone technology ... prompted Congress to pass the [Telephone Consumer Protection Act] TCPA.”⁵ In enacting the TCPA, 47 U.S.C. § 227, Congress found that “[u]nrestricted telemarketing... can be an intrusive invasion of privacy [and that] [m]any consumers are outraged over the proliferation of intrusive, nuisance calls to their homes from telemarketers.”⁶

³ *Am. Ass'n of Political Consultants, Inc. v. FCC*, 923 F.3d 159, 163 (4th Cir. 2019) (severing the government debt exemption); *Duguid v. Facebook, Inc.*, 926 F.3d 1146, 1157 (9th Cir. 2019) (same).

⁴ 47 C.F.R. § 64.1200(d); *2003 TCPA Order*, 18 FCC Rcd. 14014 at ¶¶ 100-107.

⁵ *Mims v. Arrow Fin. Svcs., LLC*, 132 S. Ct. 740, 744 (2012).

⁶ *See* TCPA, **Error! Main Document Only**. Pub. L. 102-243, § 2, 105 Stat. 2394 § 2, ¶¶ 5-6 (Dec. 20, 1991).

The Commission adopted the carrier exemption in 1992 in response to a request from the Cellular Telecommunications Industry Association (CTIA).⁷ In making this request, the carriers expressed the need to make free to end user calls to “monitor service or issue warnings to ‘roamers’ that they are moving out of the carrier’s service area.”⁸ Addressing these requests, the Commission recognized that “neither [the] TCPA nor the legislative history indicates that Congress intended to impede communications between radio common carriers and their customers *regarding the delivery of customer services* by barring calls to cellular subscribers for which the subscriber is not [charged]. Accordingly, cellular carriers need not obtain *additional consent* from their cellular subscribers prior to initiating autodialer and artificial and prerecorded message calls for which the cellular subscriber is not charged.”⁹

Cellular carriers have consent under 47 U.S.C. § 222 to use customer proprietary network information (CPNI) in the provision of telecommunication services, and such consent “indicates [the subscriber’s] willingness to have her telephone company use her CPNI in order to, among other things, tailor marketing proposals to her.”¹⁰ This consent is sufficient to permit carriers to call in the first instance “*regarding the delivery of customer services*,”¹¹ which is important because carriers often provide the cellular telephone number to the customer, whereas other businesses obtain consent when their customer voluntarily provides his or her telephone number.¹²

At the same time, however, the Commission has also recognized that “CPNI approval, however, is not a blanket approval for any and all marketing a carrier may decide to pursue. A

⁷ See *Rules and Regulations Implementing the Telephone Consumer Protection Act*, 7 FCC Rcd. 8752, ¶¶ 43, 45 (1992) (“1992 TCPA Order”).

⁸ *Id.* at ¶ 43. However, the carriers abuse this exception for telemarketing purposes. See *Exhibit Screenshots*.

⁹ *Id.* at ¶ 45.

¹⁰ 2003 TCPA Order, 18 FCC Rcd. 14014 at ¶ 101, note 319.

¹¹ 1992 TCPA Order, 7 FCC Rcd. 8752 at ¶¶ 43, 45 (CTIA comments on need for exemption).

¹² *Id.* at ¶ 30.

customer's affirmative decision to enroll on a do-not-call list is a much more direct and reliable indicator of a customer's willingness to receive marketing advances via the telephone.”¹³ In fact, the Commission “specifically determine[d] that CPNI approval does not equate to unlimited consent to market without restriction.”¹⁴ There are sound policy reasons for presuming consent between a carrier and its subscribers, especially with respect to the service calls referenced in the CTIA's 1992 comments. Those reasons disappear when the customer requests that the calls stop, especially for telemarketing calls. Interpreting the carrier exemption to post-revocation marketing calls simply does not protect the privacy rights that the TCPA was intended to protect.¹⁵

IV. The TCPA Already Requires Carriers to Honor Do Not Call Requests.

The Commission's company-specific do-not-call rules provide that “[n]o person or entity shall initiate any call for telemarketing purposes to a residential telephone subscriber unless such person or entity has instituted procedures for maintaining a list of persons who request not to receive telemarketing calls made by or on behalf of that person or entity.”¹⁶ In 2003, the Commission extended this protection to wireless numbers.¹⁷ In 2003, the Commission also made clear that this provision applies to telecommunications carriers.¹⁸

The company specific do not call rule requires carriers engaged in telemarketing to institute procedures for maintaining a do not call list.¹⁹ These procedures require that carriers

¹³ 2003 TCPA Order, 18 FCC Rcd. 14014 at ¶ 101, note 319.

¹⁴ *Id.* at ¶ 102.

¹⁵ 47 U.S.C. § 227(b)(2)(C).

¹⁶ 47 C.F.R. § 64.1200(d).

¹⁷ *See* 47 C.F.R. § 64.1200(e); 18 FCC Rcd. 14014 at ¶ 166.

¹⁸ 2003 TCPA Order, 18 FCC Rcd. 14014 at ¶¶ 100-107.

¹⁹ 47 C.F.R. § 64.1200(d).

both document and honor do not call requests.²⁰ Pursuant to this rule, carriers are already prohibited from making telemarketing calls to customers that have requested not to receive such calls. Since the calls are already illegal, there is no legitimate need or reason for exempting telemarketing calls from subsection 227(b) when the customer has asked that the calls cease.

V. Applying the Carrier Exemption Post-Revocation Renders it Unconstitutional.

For the reasons stated in Part III, above, the carrier exemption serves a legitimate purpose if it is construed as a *presumed consent* rule that alleviates the need to provide *additional consent* beyond that provided via CPNI. However, interpreting such consent as irrevocable or eliminating carriers from the consent requirement entirely would violate the First Amendment.

The TCPA as originally enacted was a permissible time, place, and manner restriction because it was content neutral.²¹ After the government debt exemption was passed, two Circuit Courts of Appeals held that such exemption was an unconstitutional content based exemption, and they severed it from the TCPA.²² The carrier exemption is also a content based exemption which favors a particular speaker. It is constitutional as a narrowly tailored rule of consent, which is derived from consent via CPNI and the relationship between a carrier and its cellular service. However, if that exemption is applied more broadly to prohibit revocation of such consent, it becomes suspect. If that exemption is applied even more broadly to prohibit revocation of consent to *telemarketing* calls for which the Commission has already deemed to be prohibited,²³ there is no longer any legitimate government interest in favoring this particular category of speaker. Such an interpretation would clearly violate the First Amendment.

²⁰ *Id* at subsections (d)(3) and (d)(6).

²¹ *See, e.g., Wreyford v. Citizens for Transp. Mobility, Inc.*, 957 F. Supp. 2d 1378 (N.D.Ga. 2013).

²² *See Am. Ass'n of Political Consultants, Inc. v. FCC*, 923 F.3d 159, 163 (4th Cir. 2019) (severing the government debt exemption); *Duguid v. Facebook, Inc.*, 926 F.3d 1146, 1157 (9th Cir. 2019) (same).

²³ 47 C.F.R. § 64.1200(d).

VI. Conclusion.

For the foregoing reasons, the Commission should construe the carrier exemption as a presumed consent rule, at least with respect to telemarketing. Such an interpretation is the only interpretation consistent with the Commissions' company specific do not call rule and the First Amendment.

Respectfully submitted,



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Exhibits on Following Page(s)



